



STATE OF NEW HAMPSHIRE  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Town of Hampton

Complainant

v.

Hampton Firefighters, Local 2664. IAFF  
IAFF, AFL-CIO, CLC

Respondent

Case No: F-0118-13

Decision No. 2005-124

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Town of Hampton

Complainant

v.

Hampton Firefighters, Local 2664. IAFF  
IAFF, AFL-CIO, CLC

Respondent

Case No: F-0118-14

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APPEARANCES

Representing Town of Hampton:

Elizabeth A. Bailey, Esquire

Representing Hampton Firefighters, Local 2664, IAFF:

John S. Krupski, Esquire

BACKGROUND

The Town of Hampton ("the Town") filed unfair labor practice complaints on June 23, 2005 alleging that the Hampton Firefighters, Local 2664. IAFF, AFL-CIO, CLC (hereinafter "the Union") violated RSA 273-A:5 II (f) by breaching the parties' collective bargaining agreement ("CBA"). The Town asserts that the Union's grievances relating to "shift configuration," dated

April 10, 2005, and relating to "fire station coverage," dated April 20, 2005 fall within the scope of its' management rights as expressed within Article 4 of the parties' CBA, and hence are not subject to the CBA's grievance procedure. The Union filed its answers denying the Town's charges on July 8, 2005. On August 1, 2005, the Town filed a "Motion to Order the Arbitration Demanded by the Hampton Firefighters, Local 2664, IAFF, to be held in Abeyance" in PELRB Case No. F-0118-13 seeking a Board order staying an arbitration hearing scheduled for September 26, 2005. On August 15, 2005, the Association filed its objections thereto and a Motion to Dismiss. On August 19, 2005, the Town also filed a "Motion to Order the Arbitration Demanded by the Hampton Firefighters, Local 2664, IAFF, to be held in Abeyance" in PELRB Case No. F-0118-14 seeking a Board order staying an arbitration hearing scheduled for December 12, 2005. On August 31, 2005, the Association filed its objections thereto and a Motion to Dismiss in that case as well.

A pre-hearing conference was conducted at Board offices on August 19, 2005. At that time, the parties stipulated that PELRB Case Nos. F-0118-13 and F-0118-14 would be consolidated solely as to the issue of jurisdiction and that the case as to jurisdiction would be presented through written pleadings. In accordance with the Pre-hearing Memorandums issued in these matters, specifically PELRB Decision Nos. 2005-109 and 2005-110, the Town filed its objections to the Union's Motions to Dismiss on August 30, 2005 and, subject to the Union filing supplemental argument by September 2, 2005, which it did not, the parties' submissions on the issue of jurisdiction were deemed closed as of that date.

#### FINDINGS OF FACT<sup>1</sup>

1. The Complainant, Town of Hampton ("the Town"), is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Respondent, Hampton Firefighters Local 2664, IAFF ("the Union") is the duly certified exclusive representative for certain public employees employed by the Town's Fire and Rescue Department.
3. The Town and the Union are parties to a collective bargaining agreement (CBA) for the period April 1, 2003 to March 31, 2006. (Exhibit 1, Town's Improper Practice Charges - Case No. F-0118-13 & 14).
4. Article 30 of the parties' CBA contains a grievance procedure. Section 5 of Article 30 contains arbitration procedures. Section 5 (c) of Article 30 specifically provides that "[t]he arbitrator shall be empowered to determine all questions of arbitrability of the grievance submitted to him/her under this provision." Section 5 (d) specifically provides that "[t]he decision of the arbitrator shall be final and binding on the parties." (Exhibit 1, p. 28, Town's Improper Practice Charge - Case No. F-0118-13 & 14).

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<sup>1</sup>Findings of Fact 1 – 16, below, were facts alleged by the Town in its' respective unfair labor practice complaints and admitted to by the Union in its' answers thereto.

5. Article 4 of the parties' CBA provides in full:

ARTICLE 4  
MANAGEMENT RIGHTS CLAUSES

Section 1.

Except as specifically limited by the express provisions of this Agreement, the Employer retains traditional rights (such as historically existed prior to the first agreement) to manage and direct the affairs of the Employer in all of its various aspects and to manage and direct its employees including but not limited to the following: to plan, direct, control and determine all operations and services of the Employer; to direct the working forces; to establish the qualifications for employment; and to layoff employees for lack of work or lack of funds; to schedule and assign work; to establish work and productivity standards and to, from time to time, change those standards; to assign overtime; to determine the methods, means, organization, and number of personnel by which such operations are to be conducted; to make and enforce rules and regulations; to employ, discipline, transfer, suspend, demote and discharge employees for just cause; to change or eliminate existing methods, equipment or facilities; provided however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.

Section 2.

The provisions of this Article are not subject to the provisions of Article 30, entitled "Grievance Procedure."

(Exhibit 1, p. 6, Town's Improper Practice Charges - Case No. F-0118-13 & 14).

6. By letter dated April 10, 2005, from Local 2664 to Town of Hampton Fire Chief Hank Lipe, the Union submitted what it called a "grievance" "in accordance with Article 30 of the [CBA]" between the Town and the Union. In this April 10, 2005 letter, the Union contended as follows:

Currently the Department is violating the [CBA] by not filing [sic] each shift to the outlined positions. Currently there are two shifts at the agreed upon 10 positions and two shifts that are not. This grievance seeks to address this as continuing violation of the [CBA].

The remedy we seek is the immediate return to the shift configuration as defined in General Order No. 05-13. We further seek that the members next in line on the appropriate overtime list be paid for those open shifts that went unfilled.

(Exhibit 2, Town's Improper Practice Charge - Case No. F-0118-14).

7. By letter dated April 11, 2005, Chief Lipe responded to the Union and denied the relief it sought. (Exhibit 4, Town's Improper Practice Charge - Case No. F-0118-14).

8. By letter dated April 13, 2005, the Union submitted a "grievance" to Town Manager James Barrington. In this April 13, 2005 letter, the Union reiterated the same position it had set forth in its April 10, 2005 letter to Chief Lipe. (Exhibit 5, Town's Improper Practice Charge - Case No. F-0118-14).

9. By letter dated April 21, 2005, Mr. Barrington responded to the Union's April 13, 2005 letter. In his April 21, 2005 letter Mr. Barrington stated in part:

"Your letter fails to cite what section or provision of the contract you believe is being violated.

In any event, Article 4, Management Rights Clauses, state in part that the employer retains the right, '... to establish work and productivity standards and to, from time to time, change those standards; to assign overtime; to determine the methods, means, organization, and number of personnel by which such operations are to be conducted...' Furthermore, Section 2 of Article 4 specifies that 'The provisions of this Article are not subject to the provisions of Article 30, entitled 'Grievance Procedure.'"

(Exhibit 6, Town's Improper Practice Charge - Case No. F-0118-14).

10. By letter dated April 27, 2005, the Union stated that it wrote "in reply" to Mr. Barrington's April 21, 2005 letter to "supplement" its "original grievance." The Union stated in part:

"The aforementioned grievance is based on an [sic] violation of the [CBA], specifically Article 15 (Overtime), Article 40 (Safety & Health) and all other relevant sections of the [CBA]. General Order No. 05-13, dated April 5, 2005, sets the shift configuration as one Fire Alarm Operator, one Lieutenant, one Captain and seven Firefighters."

(Exhibit 7, Town's Improper Practice Charge - Case No. F-0118-14).

11. By letter dated May 6, 2005, Mr. Barrington responded to the Union's April 27, 2005 letter. In his May 6, 2005 letter, Mr. Barrington denied the Unions request and stated in part:

"I find no violations of Article 15 (Overtime) in General Order 05-13.

While your supplemental information charges a violation of Article 40 (Safety and Health), I find no violation of Article 40 in General Order 05-13.

In any event, Article 4, Management Rights Clauses, states in part that the employer retains the right, '...to establish work and productivity standards and to, from time to time, change those standards; to assign overtime; to determine the methods, means, organization, and number of personnel by which such operations are to be conducted..., to change or eliminate existing methods, equipment or facilities' Furthermore, Section 2 of Article 4 specifies that 'The provisions of this Article are not subject to the provisions of Article 30, entitled 'Grievance Procedure.'"

(Exhibit 8, Town's Improper Practice Charge - Case No. F-0118-14).

12. By letter dated April 20, 2005, from the Union to Fire Chief Lipe, the Union submitted what it called a "grievance" "in accordance with Article 30 of the [CBA]" between the Town and the Union. In this April 20, 2005 letter, the Union contended as follows:

"The local has been notified of a recent, and now ongoing violation of the [CBA], specifically Articles 40 (Safety & Health), 2 (Recognition), 9 (Residency), 15 (Overtime), and all other relevant sections of the [CBA]. On Friday, April 15, 2005 (05-0687) at 2313 hours engine 2 (Station 2) responded mutual aid to Amesbury, MA. Engine 2 did not return to quarters until 0302 hours on April 16. One firefighter was recalled to cover Station 2 thus creating an unsafe situation for both the town and its employees.

Further, the current situation violates long standing past practice. This grievance seeks to address this as continuing violation of the [CBA].

The remedy we seek is a return to the practice of fully covering fire stations while an Engine or Ladder responds to the mutual aid call."

(Exhibit 2, Town's Improper Practice Charge - Case No. F-0118-13).

13. By letter dated April 21, 2005, Chief Lipe responded to The Union and denied the relief it sought. (Exhibit 3, Town's Improper Practice Charge - Case No. F-0118-13.)
14. By letter dated April 25, 2005, the Union submitted a "grievance" to Town Manager James Barrington. In this April 25, 2005 letter, the Union reiterated the same position it had set forth in its April 20, 2005 letter to Chief Lipe. (Exhibit 4, Town's Improper Practice Charge - Case No. F-0118-13.)
15. By letter dated May 6, 2005, Mr. Barrington responded to the Union's April 25, 2005 letter. In his May 6, 2005 letter Mr. Barrington stated in part that he found no violations of Article 40, Article 2, Article 9, Article 15 and stated:

"In any event, Article 4, Management Rights Clauses, state in part that the employer retains the right, '... to establish work and productivity standards and to, from time to time, change those standards; to assign overtime; to determine the methods, means, organization, and number of personnel by which such operations are to be conducted... to change or eliminate existing methods, equipment or facilities...' Furthermore, Section 2 of Article 4 specifies that 'The provisions of this Article are not subject to the provisions of Article 30, entitled 'Grievance Procedure.'"

(Exhibit 4, Town's Improper Practice Charge - Case No. F-0118-13.)

16. In a letter dated June 2, 2005, the Union notified the Town that it was taking both the April 10<sup>th</sup> and April 20<sup>th</sup> grievances to arbitration in accordance with Article 30, and Demands for Arbitration, also dated June 2, 2005, were filed by the Union with the American Arbitration Association (Exhibits 9 & 10 and 12 & 13, respectively, Town's Improper Practice Charges - Case No. F-0118-13 & 14.)
17. Article 30, Section 1 of the parties' CBA defines "grievance" as "a dispute or difference of opinion raised by an employee covered by this agreement or the Town involving the meaning, interpretation or application of the express provisions of this agreement. (Exhibit 1, p. 26, Town's Improper Practice Charges - Case No. F-0118-13 & 14.)

### DECISION AND ORDER

#### SUMMARY OF DECISION

The Union's Motions to Dismiss are granted. The Board lacks jurisdiction to consider these matters at this time based upon the arbitration provisions set forth in Article 30 of the CBA. As specified therein, the parties have agreed to submit grievances to final and binding arbitration, and also that an arbitrator is empowered to determine all questions of arbitrability. The Union's grievances shall therefore proceed to arbitration.

#### DISCUSSION

As reflected in the Union's answers to the Town's complaints, there is no genuine issue of material fact presented by these matters. There is, however, a question of law as to whether the Union's grievances may be subject to arbitration.

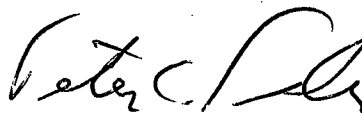
In this regard, it is well settled that "in the absence of a contractual provision granting the arbitrator authority to determine arbitrability of a given dispute, [this Board] has exclusive original jurisdiction over the threshold question of arbitrability." *School District #42 of the City of Nashua v. Murray*, 128 N.H. 417, 419 (1986). As noted by the New Hampshire Supreme Court in *Murray*, "it is true, of course, that a contract may provide expressly that substantive

arbitrability will itself be subject to arbitration..." *Id.* at 420, 421 (citation omitted). Here, the parties have granted the arbitrator authority to determine arbitrability in Article 30, Section 5 (c), by specifically agreeing "[t]he arbitrator shall be empowered to determine all questions of arbitrability of the grievance submitted to him/her under this provision." (See Finding of Fact No. 4, above). The Court has stated that under these circumstances "[t]he overriding concern is 'whether the contracting parties have agreed to arbitrate a particular dispute,' *Appeal of Westmoreland School Board*, 132 N.H. 103, 109 (1989)...[and]...[w]here the parties [have] 'clearly and unmistakably submitted the issue of arbitrability to the arbitrator without reservation..., the arbitrator will have authority to render a decision on the issue.' *Appeal of Police Commission of the City of Rochester*, 149 N.H. 528, 534 (2003) (citation omitted).

In *Westmoreland*, the Court adopted the rule that where an arbitration clause exists in a CBA, arbitration should be ordered unless it may be determined "with positive assurance that the CBA is not susceptible of an interpretation that covers the asserted dispute." *Appeal of Westmoreland School Board*, 132 N.H. 103, 106 (1989). See also *Amherst School District v. Amherst Education Association/NEA-NH*, PELRB Decision No. 2004-022 (March 16, 2004). Standing alone, the language of Article 4, Section 2 would appear to constitute "positive assurance" that the provisions of Article 4 shall not be subject to the grievance and arbitration procedure contained in Article 30. However, the question of Article 4's applicability to the instant grievances is still one of arbitrability. The parties' agreement in Article 30, Section 5 (c) to submit questions of arbitrability to an arbitrator expresses their intent to have any such issues addressed in that manner in the first instance. While the Town may legitimately argue that the instant grievances arise out of Article 4 by virtue of its' exercise of management rights described therein, the Union has alleged violations of other contractual provisions, specifically Article 15 (overtime) and Article 40 (safety and health) in its' April 10, 2005 grievance, and Article 40 (safety and health), Article 2 (recognition), Article 9 (residency), and Article 15 (overtime) in its' April 20, 2005 grievance. (See Findings of Fact Nos. 10 & 12, above). Under the circumstances, it is up to the arbitrator to determine if the language in Article 4, Section 2 renders these grievances non-arbitrable. Accordingly, the Union's Motions to Dismiss are hereby granted and the parties are directed to proceed to arbitration.

So ordered.

Signed this 20<sup>th</sup> day of September, 2005.



Peter C. Phillips, Esq.  
Hearing Officer

Distribution:  
Elizabeth A. Bailey, Esq.  
John S. Krupski, Esq.